Filed 4/2/10 P. v. Pena and Berican CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL A. PENA and CHRISTIAN J. BERCIAN, Defendants and Appellants.	B215191 (Los Angeles County Super. Ct. No. MA039645)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Reversed in part; affirmed in part; remanded for resentencing.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant Daniel A. Pena.

Marta L. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant Christian J. Bercian.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Daniel Anthony Pena and Christian Josue Bercian, appeal from their convictions for second degree robbery (Pen. Code,[1] § 211), and five counts of assault with a machinegun. (§ 245, subd. (a)(3).) The jurors also found that a principal was armed in the commission of the robbery and assaults with a machinegun (§ 12022, subd. (a)(2)), a principal used a firearm in the commission of the robbery (§ 12022.53, subds. (b), (e)(1)), and the crimes were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).) Mr. Pena admitted that he was previously convicted of a serious felony and served a prior prison term. Mr. Pena argues there is insufficient evidence to support the gang enhancement and the trial court improperly: selected count 3 as the base term; imposed more than one section 667, subdivision (a)(1) enhancement; and failed to award sufficient presentence custody credits. Mr. Bercian argues the gang enhancement should be stricken and this court should conduct an independent review of the peace officer personnel records. Mr. Pena seeks to join the arguments of Mr. Bercian that accrue to his benefit. The Attorney General argues that Mr. Pena should not be allowed to join the arguments raised by Mr. Bercian. We reverse the judgment in part and remand for resentencing as to Mr. Bercian, but affirm in all other respects.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) At approximately 7:00 or 8:00 p.m. on August 25, 2007, Darrion S., his twin brother, Derrick S., Joseph J., Kareem J., Justine T., and a person identified only as "Deon" were standing on Larkin Street near Avenue Q in Palmdale. Derrick was working on Kareem's car. A red car with two males in the

---

1 All further statutory references are to the Penal Code unless otherwise indicated.

front seats approached the group with the driver's side closest to them. As Derrick approached the red car, an AK-47 with a banana clip appeared in the driver's window. The driver pointed it at the group. The driver said, "And don't make any fast moves." At trial, Darrion identified Mr. Bercian as one of the two men. Darrion was not sure if Mr. Bercian was the driver. Everyone but Derrick hid behind the car. Someone told Derrick, "Empty your pockets." Derrick removed a flashlight and some quarters. One of the men said, "What else do you have?' Derrick responded, "I don't have anything, but I can get you something." Derrick removed a stack of compact discs from Kareem's car and gave them to the driver of the red car.

The driver asked Derrick, "Do you bang?" Derrick understood that to question whether he was involved with a gang. Derrick responded, "No." The passenger in the red car said, "Should we smoke 'em?" The driver said, "No." The car then drove away. Derrick did not want to testify. Both Darrion and Derrick identified the driver and passenger at a field showup the same evening as the crime. However, Derrick could not identify anyone at trial. Derrick was familiar with the local gang in the area where he resided.

Yesenia A. was with her friends Alex M. and Monique R. on August 25, 2007, in the area of Larkin Avenue and Avenue Q. The three minors got into the back seat of a car with two male occupants in order to get a ride to Alex's home. Yesenia did not know the driver or passenger. Yesenia did not want to testify. The police stopped the car when the three minors were in the back seat. The driver sped away. The driver drove to some apartments. The driver and front passenger immediately got out of the car and jumped a fence. One of the men threw a rifle. Yesenia saw the driver pass a "long gun" or rifle to the front passenger inside the car that evening. Yesenia did not see anyone hold the gun towards individuals outside the car and demand money from them. At trial, Yesenia identified Mr. Pena and Mr. Bercian as the two individuals in the car on August 25, 2007. However, Yesenia did not remember which man was driving and which one was a passenger. Yesenia and her companions, Alex and Monique, were not involved in a holdup with a rifle.

Los Angeles County Sheriff's Deputy Douglas Parkhurst worked in the gang enforcement team. On August 26, 2007, Deputy Parkhurst was on patrol in a marked sheriff's car. At approximately 9:30 p.m., Deputy Parkhurst received a call regarding the occupants of a red, four-door car brandishing a rifle. Deputy Parkhurst saw a Red Nissan at the intersection of Larkin Avenue and Q-3 Avenue. When the Nissan pulled over, Deputy Parkhurst illuminated the car with his spotlights. Deputy Parkhurst saw five people in the car, including the male driver, who had a shaved head with a large tattoo on the back of his head. Deputy Parkhurst identified Mr. Pena as the driver. There was also a front seat passenger identified as Mr. Bercian. There were also three juveniles in the rear seat, including Yesenia A. and Alex M. Deputy Parkhurst got out of the patrol car. As Deputy Parkhurst approached the Nissan, he yelled to those inside: "Show me your hands, . . . let me see your hands." All of those inside the Nissan turned and looked backwards. The Nissan sped away from the curb.

Deputy Parkhurst requested assistance and followed the Nissan. A short time later, the Nissan stopped in an apartment complex. Detective Robert Gillis's sheriff's unit arrived at the time Deputy Parkhurst parked. As the deputies walked toward the Nissan, all four doors opened and those inside attempted to flee. The deputies ordered them: "Get down on the ground. Let me see your hands." Mr. Pena moved toward some trash cans, where he appeared to toss a rifle. An AK-47 rifle with a live round in the chamber and a banana clip was subsequently recovered from the trash can area and booked into evidence. Mr. Pena then went over the wall along with Mr. Bercian and Alex. M. Deputies on the other side of the wall detained all three males. Deputy Parkhurst detained Yesenia and Monique.

Deputy Parkhurst interviewed Alex M. within 15 minutes following his detention. Alex told Deputy Parkhurst that he, Yesenia and Monique were walking when they saw the red Nissan driven by Mr. Pena. Mr. Bercian was a passenger in the car. The minors asked Mr. Pena to drive them to a liquor store to buy alcohol. Once at the liquor store, they realized they had no money. Mr. Pena then drove the minors back to a house on Larkin Street where they were to be dropped off. While in the Nissan, Alex saw a rifle

across Mr. Pena's lap. Alex was frightened and wanted to get out of the car. When Mr. Pena pulled to the curb, a sheriff's car pulled behind them. Mr. Pena then sped away. Alex ran when they got to the apartment complex because he was scared.

Deputy Parkhurst recovered mail addressed to Mr. Pena from inside the red Nissan. A piece of cardboard with the same name as that tattooed on Mr. Pena's head was also found in the car. The name represented a local gang. A glove containing several live rounds of ammunition was recovered from Mr. Pena's pants pocket.

Deputy Jason Ames had set up a containment at Larkin Avenue and Avenue Q-3 in response to the radio broadcast. Derrick approached Deputy Ames and told him that he had been robbed at gunpoint. Derrick pointed out the four other individuals who had been with him at the time. Derrick told Deputy Ames that a red Nissan had driven up to where he and friends had been standing. The driver asked, "Do you bang?" The driver then pointed an AK-47 at him. The driver then waved the gun at Derrick's four companions. The driver said, "Don't make any fast moves." Deputy Ames also spoke to Darrion apart from Derrick. Darrion reported that the driver pointed the rifle at him and the rest of the group, ordering them "Don't make any fast moves."

Deputy Ames later took all five individuals to a field identification of Mr. Pena and Mr. Bercian at the location where they had been detained. All five individuals identified Mr. Pena as the driver and Mr. Bercian as the passenger at the time the robbery occurred. The three minors in the back seat of the Nissan also identified Mr. Pena and Mr. Bercian as the driver and the passenger respectively. When Mr. Bercian was booked into custody he was observed to have a tattoo on his back that identified a local street gang. Mr. Pena had a tattoo on the back of his head which identified a local street gang. When he was detained, Mr. Pena admitted to Detective Gillis that he was a member of a local gang and gave his nickname.

Detective Gillis was assigned to the Antelope Valley gang task force for approximately seven years. In that capacity, Detective Gillis was familiar with the local street gang. Detective Gillis investigated numerous crimes involving the local gang members in Palmdale such as: shootings; narcotic sales; auto thefts; robberies; terrorist

threats; and murders. There are approximately 50 members in the local gang who share common signs or symbols and tattoos. The other local gang uses the New Orleans Saints football team logo as their symbol. The symbol is used in tattoos. These two gangs have joined forces over the years. The area of Larkin Avenue and Avenue Q-3 is within the territory claimed by these gangs.

Detective Gillis had prior contacts with Mr. Bercian. Mr. Bercian was a suspect in an investigation of criminal threats made to another individual. Detective Gillis interviewed Mr. Bercian in that case. An individual who claims to be a gang member but has not earned such status would risk beating or death. Mr. Bercian had admitted his gang membership to Detective Gillis in the past. A field interview card completed regarding Mr. Bercian indicated that he was a member of a local gang and gave his gang nickname. Another field contact card completed by gang deputies indicated Mr. Bercian was present in an area where the local gang congregated, was wearing gang clothing, and other gang members were present. A field interview card completed regarding Mr. Pena indicated he admitted that he was a member of the other local gang and gave his gang nickname.

Detective Gillis was given a hypothetical scenario where two males in a red Nissan approached a group of five young people, pointed an AK-47 at them, ordered one of the individuals over to the car and asked, "Do you bang?" After the individual said, "No," the driver held the AK-47 toward the minor, threatened him to empty out his pockets and takes the belongings. The driver then said, "What is this shit? I don't want this shit. Get me something else." The minor then got additional items from a nearby car and gives them to the driver. The driver also pointed the gun at four others and said, "Don't make any fast moves." The passenger asked the driver, "Should we shoot him?" The driver said, "No, let's just get out of here." After leaving the scene, the car was pulled over by police. The occupants of the red car jumped out. The driver threw an AK-47 near a trash alcove. The driver and passenger jumped a fence and ran away. Three other individuals in the back seat of the car also jumped out. The male jumped the fence. The driver was a member of one local gang and the passenger was a member of

another local gang that had joined forces. Based on his background, education and training, Detective Gillis believed the hypothetical facts suggested the robbery and assaults with an AK-47 rifle were committed for the benefit of the criminal street gangs.

Detective Gillis stated that the commission of crimes by gang members creates fear in the community. Word travels on the street that the gangs are claiming the neighborhood. There had been numerous shootings and murders in the neighborhood between the local and rival gangs. When the local gangs commit crimes it benefits their stature. Such activities also serve to recruit future gang members. The reputation of the individual gang members committing the crimes is also enhanced.

Detective Gillis was familiar with Daniel Oliveras, a member of the local gang, who pled guilty to discharging a firearm after he shot at a rival gang member on April 21, 2003, case No. MA026467. Detective Gillis investigated that incident. Damon Steven Morales Allen was a member of the local gang. On November 21, 2005, Mr. Allen pled guilty to a robbery in case No. MA034586.

III. DISCUSSION

A. Sufficient Evidence Supports the Gang Enhancement

Mr. Pena argues there was insufficient evidence to support his gang enhancement. During a discussion of jury instructions, the trial court inquired about the prosecutor's use of a section 246.3 plea as it related to Mr. Olivares as a predicate offense. The trial court noted that a violation of that section did not constitute a predicate offense. The trial court stated: "So I was curious as to what your theory was. I mean, robbery is. I know it can be proven by the current offenses, and certainly Damon Morales Allen." The prosecutor explained that although Mr. Olivares had pled guilty to a section 246.3 offense, he was also arrested for a violation of section 422, criminal threat, which qualified as a predicate offense. Thereafter, the trial court included the predicate offenses of robbery and/or

criminal threats in CALCRIM No. 1401 regarding the pattern of criminal gang activity as it relates to the commission of crimes for the benefit of a criminal street gang.

In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Wilson* (2008) 44 Cal.4th 758, 806; *People v. Carter* (2005) 36 Cal.4th 1114, 1156; *People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *Taylor v. Stainer, supra,* 31 F.3d at pp. 908-909.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) The California Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.) The same standard applies to a claim of insufficiency of the evidence to support a gang enhancement. (*People v. Leon* (2008) 161 Cal.App.4th 149, 161; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.)

Section 186.22 provides in relevant part: "(b)(1) [A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and

consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . . [¶] . . . [¶] (e) As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons: [¶] . . . [¶] (2) Robbery . . . . [¶] (24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422 . . . ." "[T]he 'criminal street gang' component of a gang enhancement requires proof of three essential elements: (1) that there be an 'ongoing' association involving three or more participants, having a 'common name or common identifying symbol'; (2) that the group has one of its 'primary activities' the commission of one or more specified crimes; and (3) the group's members either separately or as a group 'have engaged in a pattern of criminal gang activity.' [Citation.]" (*People v. Vy, supra,* 122 Cal.App.4th at p. 1222, citing *People v. Gardeley* (1996) 14 Cal.4th 605, 617; see also § 186.22, subd. (f); *In re Alexander L.* (2007) 149 Cal.App.4th 605, 610-611; *People v. Ortiz, supra,* 57 Cal.App.4th at p. 484.)

The California Supreme Court interpreted this portion of the California Street Terrorism Enforcement and Prevention Act of 1988: "Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities. Both past and present offenses have some tendency in reason to show the group's primary activity (see Evid. Code, § 210) and therefore fall within the general rule of admissibility (*id.*, at § 351). . . ." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) The *Sengpadychith* court concluded: "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute [§ 186.22, subd. (e)]. Also sufficient might be expert testimony, as occurred in [*People v.*] *Gardeley, supra,* 14 Cal.4th 605. . . ." (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 324.) In *Gardeley,* a San Jose Police Department

detective testified that the gang of which the defendant had been a member engaged in the sales of narcotics and witness intimidation. The detective had personally investigated "hundreds of crimes" committed by gang members. The detective gathered information from conversations with gang members as well as San Jose Police Department employees and other law enforcement agencies. (*People v. Gardeley, supra,* 14 Cal.4th at p. 620.) Opinion testimony of the type presented in *Gardeley* may constitute evidence sufficient to support a section 186.22 finding. (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 324; See also *People v. Vy, supra,* 122 Cal.App.4th at pp. 1223-1224; *People v. Augborne* (2002) 104 Cal.App.4th 362, 372-373.)

In this case, Mr. Bercian was known as a member of the local gang based on his own previous admissions, tattoos, nickname, and associations and Detective Gillis's investigation. Detective Gillis testified that he had extensive experience with local gangs and investigations into their activities. Detective Gillis was familiar with the local gangs. Detective Gillis identified the primary activities of gangs as: shootings; narcotic sales; auto thefts; robberies; terrorist threats; and murders. Detective Gillis was aware that the local gang, which consisted of approximately 50 members, had joined forces with another local gang. Detective Gillis identified defendants as gang members based upon prior police contacts and their own admissions. Detective Gillis testified that he believed the manner in which the robbery and assaults with a firearm in this case occurred was consistent with gang members' efforts to cause fear in the neighborhood and gain status within the gang. Detective Gillis relied upon his knowledge, experience and training in concluding the hypothetical facts suggested the robbery and assaults with an AK-47 rifle were committed for the benefit of the gangs. Both defendants were members of the gang when the crimes were committed. In addition, the crimes comprised predicate offenses within the meaning of section 186.22. (See *People v. Gardeley, supra,* 14 Cal.4th at pp. 624-625; [The charged offenses may be considered in determining a pattern of criminal street gang activity]; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1401; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) The jury was instructed with CALCRIM No. 1401, which described a pattern of criminal gang activity as: "1. The commission of,

attempted commission of, or conviction of: [¶] Any combination or two or more of the following crimes: robbery and/or criminal threats; [¶] 2. At least one of those crimes was committed after September 26, 1988; [¶] 3. The most recent crime occurred within three years of one of the earlier crimes; [¶] And [¶] 4. The crimes were committed on separate occasions, or were personally committed by two or more persons."

Detective Gillis testified that he investigated the incident that involved Mr. Olivares, a local gang member, shooting at a rival gang member. This testimony was sufficient, without evidence of an assault with a deadly weapon conviction or carrying a loaded firearm conviction, to constitute a predicate offense. (See § 186.22, subds. (e) (1), (33).) In any event, as noted by the trial court, the robbery in this case and the robbery involving Mr. Allen were sufficient evidence of a pattern of criminal gang activity. In addition, the assaults with an AK-47 are predicate offenses as defined in section 186.22, subdivision (e)(1). Substantial evidence supports the jurors' findings that the crimes were committed for the benefit of a criminal street gang.

B. Sentencing

1. Selection of count 3 as Mr. Pena's principal term

Mr. Pena argues that the trial court misunderstood the scope of its sentencing discretion because it chose the count which provided the longest sentence for the base term. Preliminarily, we agree with the Attorney General that defendant's failure to object at the time of sentencing resulted in a waiver of this issue on appeal. (*People v. Butler* (2003) 31 Cal.4th 1119, 1126; *People v. Stowell* (2003) 31 Cal.4th 1107, 1113 ["Such '[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention'"]; *People v. Scott* (1994) 9 Cal.4th 331, 355 [defendant's claim that reasons used for sentencing were "inapplicable, duplicative, and improperly weighed" was waived; *People v. Kelley* (1997) 52 Cal.App.4th 568, 581-582 [failure to consider mitigating factors].) Neither defense counsel objected to the sentence imposed

or questioned the trial court's exercise of discretion during the colloquy with the prosecutor as set forth below.

We address the issue notwithstanding that waiver. The California Supreme Court has held: "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377, quoting *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978; *People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 831.) Here, in imposing sentence as to both defendants, the trial court first set forth the aggravating factors considered, including the number of victims, the youth of the victims, and, the defendants' prior criminal histories. The trial court continued: "I am going to start with Mr. Pena first. I am designating count 3, assault by assault weapon as the principal term. That has a range of four, eight, 12 years. The court is selecting a high term of 12 years, finding that aggravating factors outweigh mitigating factors. I have already set forth the justification in terms of the multiple victims, the youth of the victims, and the fact that I could have imposed concurrent sentencing on those counts that I mentioned. [¶] In addition, he did have some criminal record prior to the strike prior. The high term of 12 years, based upon admission of the attempted carjacking strike prior, it is mandatorily doubled to 24 years state prison." After adding the five-year section 186.22, subdivision (b)(1)(B) gang enhancement, the three-year section 12022, subdivision (a)(2) enhancement, and the five-year section 667, subdivision (a)(1) enhancement, the trial court imposed sentence on the remaining counts.

Thereafter, the trial court stated: "[B]efore I impose the other miscellaneous conditions, I want to turn now to Mr. Bercian." The trial court then selected count 1, robbery, as the principal term for Mr. Bercian and imposed the high term of five years, "For similar reasons that I stated, because he has some criminal record that I have already

noted and I could have imposed consecutive time on counts 5 through 7 . . . ." After the trial court imposed the gang and firearm enhancements, the prosecutor interrupted, stating, "I just thought that where there is - - where he's been convicted of multiple crimes, the court has to impose the one that has [the] highest term on it." The trial court responded: "Yes. You are talking about count 3, the assault? [¶] . . . [¶] Here's the problem with the assault. 245(a)(3), high term is 12. [¶] . . . [¶] The gang allegation adds a consecutive five - - [¶] . . . [¶] - - the 12022 adds three, so that only totals 20 years - - [¶] . . . [¶] - - and under the law, I have to impose 25."

Section 1170.1, subdivision (a) states: "Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses."

In *People v. Felix* (2000) 22 Cal.4th 651, 655, our Supreme Court held: "The court imposes the full term, either lower, middle, or upper, for the principal term. However, in general . . . the court imposes only 'one-third of the middle term' for subordinate terms. [Citation.] A determinate term for a given offense might also be lengthened by sentence enhancements. . . . The full term for the enhancement is added to the principal term. . . . Enhancements are added to subordinate terms for 'violent' felonies, but they can be only 'one-third of the term.' [Citations.]" (*Ibid.*, footnote

omitted.) (See also *People v. Nguyen* (1999) 21 Cal.4th 197, 207 [the sentencing provision for a defendant with one prior serious felony conviction in sections 667, subd. (e)(1), and 1170.12, subd. (c)(1) incorporates the principal term/subordinate term methodology of section 1170.1].)

As set forth above, the trial court gave detailed reasoning for selecting the upper term as to count 3, from the triad 4, 8, or 12 years: "I am designating count 3, assault by assault weapon as the principal term. That has a range of four, eight, 12 years. The court is selecting a high term of 12 years, finding that aggravating factors outweigh mitigating factors. I have already set forth the justification in terms of the multiple victims, the youth of the victims, and the fact that I could have imposed concurrent sentencing on those counts that I mentioned. [¶] In addition, he did have some criminal record prior to the strike prior." The colloquy referenced by Mr. Pena was actually the trial court's discussion relative to Mr. Bercian's sentencing, which was of no consequence to Mr. Pena. Any attempt to attribute the trial court's comments regarding Mr. Bercian's sentence as demonstrative of a misunderstanding of its discretion as to Mr. Pena is meritless. Because Mr. Pena had a prior serious felony conviction, he was subject to the 1170.1, subdivision (a) principal term determination, which was then doubled pursuant to section 667, subdivision (e)(1). The record demonstrates the trial court understood its discretion to impose less than the upper term as to count 3. The trial court specifically noted the triad range of sentences and selected the upper term. It is apparent from these comments that the trial court was not merely selecting the longest term available under the law. Rather, the trial court chose the term most appropriate to Mr. Pena's criminal history and the nature of the current offenses. The trial court's enumeration of the aggravating factors in selecting the 12-year upper term is also demonstrative of its proper exercise of discretion as to the principal term. As will be explained below, we must reverse and remand Mr. Bercian's sentence to allow the trial court to exercise its discretion based upon a separate sentencing error.

2. The Section 667, subdivision (a)(1) enhancement as to Mr. Pena

Mr. Pena argues and the Attorney General concedes that the trial court improperly imposed more than one section 667, subdivision (a)(1) enhancement. In addition to the five-year section 667, subdivision (a)(1) enhancement imposed as to the principal count, the trial court imposed a 20-month or one-third the five-year enhancement as to the remaining counts. Only one such enhancement may be imposed as to the aggregate sentence. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1163-1164; see also *People v. Tassell* (1984) 36 Cal.3d 77, 91, overruled on another point in *People v. Ewoldt* (1994) 7 Cal.4th 380, 387.) The California Supreme Court has consistently held: "As a general rule, only 'claims properly raised and preserved by the parties are reviewable on appeal.' [Citation.]" (*People v. Smith* (2001) 24 Cal.4th 849, 852.) A narrow exception to this waiver rule exists for unauthorized sentences or sentences entered in excess of the trial court's jurisdiction. (*Ibid.*; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1048, fn. 7; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) Such an unauthorized sentence may be corrected on appeal. (*People v. Scott, supra,* 9 Cal.4th at p. 354.) We therefore order all but one of the section 667, subdivision (a)(1) enhancements stricken.

3. Presentence custody credits

Mr. Pena argues that he is entitled to two additional days of presentence credits. The Attorney General argues that both Mr. Pena and Mr. Bercian are entitled to one additional day of presentence custody credits. We agree with the Attorney General. Defendants were in continuous custody from August 25, 2007, until they were sentenced on March 27, 2009. As a result, they are entitled to presentence credits for 580 days actual custody and 87 days of conduct credits for a total of 667 days. (§§ 2900.5, subd. (a), 2933.1, subd. (a).) The failure to award a proper amount of credits is a jurisdictional error, which may be raised at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-

346, fn. 11, 349, fn. 15; *People v. Serrato* (1973) 9 Cal.3d 753, 763-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.)

4. Section 186.22, subdivision (b)(1)(C) enhancement as to Mr. Bercian

Mr. Bercian argues and the Attorney General agrees that the trial court improperly imposed both a section 186.22, subdivision (b)(1)(C) term and a section 12022.53, subdivision (e)(2) enhancement as to count 1 because he was not found to have personally used a firearm in the commission of the offenses. We agree. In *People v. Salas* (2001) 89 Cal.App.4th 1275, 1278-1283, we held: "In a case where section 186.22 has been found to be applicable, in order for section 12022.53 to apply, it is necessary only for a principal, not the accused, in the commission of the underlying felony to personally use the firearm; *personal* firearm use by the accused is not required under these specific circumstances. However, as a consequence of this expanded liability under section 12022.53, subdivision (e), the Legislature has determined to preclude the imposition of an additional enhancement under section 186.22 in a gang case unless the accused *personally* used the firearm. In the present case, the jury never found that defendant personally used a firearm." Our Supreme Court recently addressed the issue in *People v. Brookfield* (2009) 47 Cal.4th 583, 590: "Section 12022.53(e)(2), however, limits the effect of subdivision (e)(1). A defendant who *personally* uses or discharges a firearm in the commission of a gang-related offense is subject to *both* the increased punishment provided for in section 186.22 *and* the increased punishment provided for in section 12022.53. In contrast, when another principal in the offense uses or discharges a firearm but the defendant does not, there is no imposition of an 'enhancement for participation in a criminal street gang . . . in addition to an enhancement imposed pursuant to' section 12022.53. (§ 12022.53(e)(2).)" In this case, the 10-year section 186.22, subdivision (b)(1)(C) enhancement imposed as to count 1 as to Mr. Bercian should be stricken because the jury did not find defendant personally used a firearm.

There are other considerations for the exercise of the trial court's discretion based on the striking of that enhancement. When the 10-year section 186.22, subdivision (b)(1)(C) enhancement is stricken, Mr. Bercian's sentence on count 1 is five years for the robbery plus 10 years for the section 12022.53, subdivision (b) enhancement. That 15-year sentence is no longer the longest sentence imposed within the definition of section 1170.1, subdivision (a). (See *People v. Felix, supra,* 22 Cal.4th at p. 655.) The trial court had imposed one-third the midterm of eight years on count 4, the assault with an assault weapon. However, the high term for that count was 12 years. If the trial court selected the 12-year upper term as to count 4 and added the five-year section 186.22, subdivision (b)(1)(B) term as well as the three-year section 12022, subdivision (a)(2) enhancement, the total sentence for count 4 would be 20 years. As a result, we remand the matter to allow the trial court to exercise its discretion in selecting a principal term pursuant to section 1170.1, subdivision (a). (See *People v. Meloney* (2003) 30 Cal.4th 1145, 1165; *People v. Miller* (2006) 145 Cal.App.4th 206, 209, 219.) The trial court is to personally insure the abstract of judgment is corrected to fully comport with the modifications we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 110, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

C. Peace Officer Personnel Records

Mr. Bercian requests that this court conduct an independent review of the trial court's in camera hearings regarding peace officer personnel records. Mr. Pena seeks to join Mr. Bercian's arguments where they accrue to his benefit. For the reasons set forth below, we find Mr. Bercian has forfeited his right to raise this issue on appeal.

On July, 21, 2008, Mr. Pena filed a pretrial motion to discover the peace officer personnel records of Deputies Parkhurst and Gillis regarding any acts of misconduct pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and Evidence Code section 1043. On August 7, 2008, the trial court granted the motion as to Deputy Parkhurst, conducted an in camera review of the records, and found "no information of the nature

sought to be disclosed." Neither Mr. Bercian nor his attorney was present for the proceedings. On October 21, 2008, Mr. Pena filed another *Pitchess* motion which again requested the personnel records of Deputy Gillis regarding misconduct. A hearing on the *Pitchess* motion was conducted on November 10, 2008. Again, neither Mr. Bercian nor his attorney was present at the hearing. The trial court granted an in camera review of the personnel records on the issues of perjury and fabrication of probable cause. Following the in camera review, the trial court indicated it had ordered compliance with the protective order it signed. The trial court also noted that Mr. Bercian and his defense counsel were present in the courtroom. There is no evidence in the record that Mr. Bercian joined either *Pitchess* motion brought by Mr. Pena either orally or in writing. There is no record that Mr. Bercian filed his own *Pitchess* motion. Mr. Bercian has therefore forfeited the right to raise the issue on appeal. (*People v. Ervine* (2009) 47 Cal.4th 745, 777; *People v. Wilson, supra,* 44 Cal.4th at p. 793; *People v. Santos* (1994) 30 Cal.App.4th 169, 180, fn. 8.)

By way of his joinder in Mr. Bercian's argument, Mr. Pena requests that we review the sealed transcripts prepared in connection with the motions to compel disclosure of the peace officer personnel records of Deputies Parkhurst and Gillis. We have reviewed the transcripts of the in camera hearings conducted by the trial court on August 7, 2008, and November 10, 2008, to determine if the trial court abused its discretion in denying further disclosure pursuant to the guidelines set forth in Evidence Code sections 1043 through 1047 and Penal Code sections 832.5, 832.7, and 832.8. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226-1232; see also *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 19.) Our review discloses that no abuse of discretion occurred with respect to the trial court's refusal to disclose additional information regarding the personnel files of Deputies Parkhurst and Gillis. (See *People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

IV. DISPOSITION

The judgment is modified in the following respects: all but one of the Penal Code section 667, subdivision (a)(1) enhancements as applied to Mr. Pena are reversed; an additional day of presentence custody credit is awarded to Mr. Pena and Mr. Bercian pursuant to Penal Code section 2900.5, subdivision (a); and the imposition of a Penal Code section 186.22, subdivision (b)(1)(C) term as to count 1 as applied to Mr. Bercian is stricken and the matter remanded to allow the trial court to exercise its discretion in selecting the principal term pursuant to Penal Code section 1170.1, subdivision (a). The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WEISMAN, J.*

We concur:

ARMSTRONG, ACTING P. J.

MOSK, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.